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7 United States District Court
8 Eastern District of Washington
9 (Honorable Thomas O. Rice)

10 United States of America,
11 Plaintiff,

12 v.

13 Bradley Dale Hull.

14 Defendant(s).

2:20-CR-00128-TOR-2

Defendant's Trial Brief

15
16 Bradley Hull, by and through counsel, Zachary Ayers of Ayers Law Firm,
17 P.L.L.C., and Stephen Hormel of Hormel Law Office, LLC., submits the following
18 brief in advance of trial.

19
20 A. **Authority in Support of Defendant's Proposed Instructions Nos. 3 and 4.**

21 1. Mere knowledge, mere presence and passenger of a vehicle insufficient.

22 The Ninth Circuit has long held that "a passenger [of a vehicle] may not be
23 convicted unless there is evidence connecting him with the contraband, other than his
24 presence in the vehicle.'" *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1225 (9th Cir.
25 2007) (quotations in original) (quoting *United States v. Sanchez-Mata*, 925 F.2d 1166,
26 1169 (9th Cir.1991)) (quoting *United States v. Ramos*, 476 F.2d 624, 625 (9th Cir.1973))).
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28

1 This instruction will be necessary to Hull’s defense at trial, and to closing
2 argument based on the anticipated evidence.

3
4 2. Aiding and Abetting.

5 Proposed instruction No. 4 includes a modification of Ninth Circuit Model
6 Instruction 4.1 for aiding and abetting. (ECF No. 243 at 5-6). The modification
7 adds an additional element beyond the elements contained in Model Instruction 4.1 as
8 follows: “Fourth, the defendant had foreknowledge that the possession with intent
9 to distribute was to occur...” The proposed instructions then adds the following
10 language defining “foreknowledge:”
11
12

13 Foreknowledge means that a defendant acts with
14 the specific intent to facilitate the crime with advance
15 knowledge that the crime of carjacking would be
16 committed. The defendant must have acquired such
17 advanced knowledge that the crime would be committed
18 at a time when the defendant still had a realistic
19 opportunity to do something with it—most notably, opt to
20 walk away.

21 The Supreme Court clearly established “foreknowledge” as an element for
22 aiding and abetting in *Rosemond v. United States*, 572 U.S. 65, 82 (2014). There,
23 the Supreme Court agreed with the government that a jury instruction on a charge
24 of aiding and abetting the use of a firearm during a crime of violence should have
25 included a statement that the defendant “had to know that his confederate” “would
26 use [a firearm] or something ... that makes absolutely clear that you [need]
27 foreknowledge.” *Id.* In other words, the defendant “needed advanced knowledge
28

1 of a firearm's presence" to be convicted of aiding and abetting the use of the co-
 2 defendant's firearm. *Id.* The issues in this case will be straight forward. The
 3 circumstances in this case justify a mere presence and mere passenger instruction.
 4

5 The Ninth Circuit applied *Rosemond*'s foreknowledge element for a charge
 6 of aiding and abetting a robbery on the Navajo Reservation. *United States v.*
 7 *Goldtooth*, 754 F.3d 763, 765 (2014). The Ninth Circuit specifically stated. "[t]o
 8 aid and abet a robbery, however, Appellants must have had foreknowledge that the
 9 robbery was to occur." *Id.* at 768. Relying on *Rosemond*, the Ninth Circuit wrote:
 10

11 an aiding and abetting conviction requires the government
 12 to prove the defendant had "advance knowledge" that a
 13 coconspirator would use or carry a gun as part of the
 14 crime's commission. *Id.* at 1243. "[A]dvance knowledge,"
 15 continued the Court, "means knowledge at a time the
 16 accomplice can do something with it—most notably, opt
 17 to walk away." *Id.* at 1249–50.

18 *Goldtooth*, 754 F.3d at 769 (quoting *Rosemond*, --U.S.--, 134 S.Ct. 1248-50).

19 Hull's proposed instruction No. 4 accurately states the elements and the law
 20 relating to the foreknowledge element. The Supreme Court's language is best
 21 suited to define "foreknowledge:" "[A]dvanced knowledge," ... "means knowledge
 22 at a time the [defendant] can do something with it—most notably, opt to walk
 23 away." *Rosemond*, 572 U.S. at 78.

24 Model Instruction No. 4.1 also states: "The government is not required to
 25 prove precisely whether the defendant actually committed the crime or whether the
 26 defendant aided and abetted." The commentary to Model Instruction No. 4.1 states:
 27
 28

1 “[i]t may be unnecessary to give the last paragraph if there is no dispute as to the
2 identities of the principal and the aider and abettor.” It is anticipated at trial there
3 will be no dispute as to who the principal is, Misty Haynes. Therefore, that final
4 sentence in Model Instruction 4.1 is unnecessary.
5

6 **B. The government’s proposed 404(b) evidence should be excluded.**
7

8 1. Prior 2016 conviction for conspiracy to deliver heroin.

9 The government has given notice that it intends to offer Hull’s prior conviction
10 from 2016 as other act evidence under Rule 404(b). The government proffers that the
11 “prior conviction is probative of the Defendant’s knowledge, intent, and lack of
12 mistake with respect to the methamphetamine and heroin found in his possession on
13 February 7, 2020.” (ECF No. 163 at 5). This prior conviction is not probative for any
14 of those reasons.
15
16

17 Hull is not claiming he does not know what heroin is. The prior conviction is
18 not relevant to show Hull knowingly possessed heroin. As will become obvious at the
19 start of trial, Hull defense does not hinge on whether the drugs seized from Misty
20 Haynes’ car were intended for distribution. The government has an abundance of
21 evidence to prove that Misty Haynes intended to distribute the heroin and
22 methamphetamine seized from her car, including a large quantity of drugs, found in
23 the same bag with \$13,000.00, and with a scale located in the car’s glove box.
24
25

26 Hull’s prior conviction is not necessary for the government to prove the intent
27 to distribute element. *See, United States v. Curtin*, 489 F.3d 935, 944 (9th Cir. 2007).
28

1 *Curtin* reiterated that “[e]xtrinsic acts evidence may be critical to the establishment of
2 the truth as to a disputed issue, *especially when that issue involves the actor’s state of mind and*
3 *the only means of ascertaining that mental state is by drawing inferences from conduct.*” *Id.*
4 (emphasis in original) (quoting *Huddleston v. United States*, 485 U.S. 681, 685 (1988)).
5

6 It is anticipated that the evidence will establish that Misty Haynes was
7 distributing drugs from her residence on Broadway Avenue. Thus, the government
8 does not need this prior conviction to prove an intent to distribute the drugs found in
9 her car. The prior conviction does not prove Hull’s participation with Haynes’ illegal
10 activity. Thus, admitting the prior conviction would be extremely prejudicial to Hull’s
11 defense with virtually no probative value to the government’s case. *See*, (ECF No. 171
12 at 5-7).
13

14 Finally, the Ninth Circuit in *Curtin* focused on the “similarities” between the
15 other act evidence possessed by the defendant during the commission of the alleged
16 enticement of a minor with intent to have sex to approve the district court’s admission
17 of the sexual stories about adults and minors found on the defendant’s computer just
18 before an intended meeting with the minor. *Curtin*, 489 F.3d at 945, 950 (“[T]here is
19 enough similarity or connection between the two so as to make the pictures on
20 Brand’s computer relevant to his intent...” (quoting *United States v. Brand*, 467 F.3d
21 179 (2d Cir. 2006))).
22

23 A conviction on making an agreement with some other person to deliver heroin
24 in 2016 is not similar to the conduct alleged by the government. The government’s
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1 case relies on the jury finding Hall placed the bag of drugs in the trunk for Misty
2 Haynes' car. There will be no dispute the drugs were intended to be distributed by
3 Misty Haynes. Thus, the prior conviction is not relevant and should not be admitted
4 under Rule 404(b), nor should it be admitted in light of Rule 403. The admission of
5 the prior conviction would be extremely prejudicial and have little to no real probative
6 value in this case.
7

8
9 2. Hull's photographs, gold coin, and text messages should not be admitted.

10 As previously asserted, the government's proffered exhibits 33-34 and 38-44
11 should not be admitted under 404(b). These exhibits are not relevant to whether Hull
12 had knowledge of the contents of the bag that contained drugs and money. Likewise,
13 these exhibits are not necessary to prove an intent to distribute. The text messages are
14 not similar to the alleged conduct in this case and are not needed by the government to
15 prove an intent to distribute. *See*, B.1., *supra*. For the same reasons set out in ECF
16 Nos. 222 and 227, the proffered exhibits extracted from the cell phone seized on May
17 13, 2020 should not be admitted.
18

19
20
21 C. Judicial Notice.

22 Hull requests that the Court take judicial notice of the relevant contents of the
23 2006 Chevrolet Malibu Owner Manual in Defendant's Exhibit 540. The relevant
24 portion of the owner manual shows that the trunk lock of Misty Haynes car could be
25 released by a remote button on the inside driver's door of the 2006 Malibu. The
26 relevance will be apparent as evidence unfolds at trial.
27
28

1 Federal Rule of Evidence states as follows:

2 **(b) Kinds of Facts That May Be Judicially Noticed.** The

3 court may judicially notice a fact that is not subject to

4 reasonable dispute because it:

5 (1) is generally known within the trial court's

6 territorial jurisdiction; or

7 (2) can be accurately and readily determined from

8 sources whose accuracy cannot reasonably be questioned.

9 **(c) Taking Notice.** The court:

10 (1) may take judicial notice on its own; or

11 (2) must take judicial notice if a party requests it and

12 the court is supplied with the necessary information.

13 **(d) Timing.** The court may take judicial notice at

14 any stage of the proceeding.

15 **(e) Opportunity to Be Heard.** On timely request, a

16 party is entitled to be heard on the propriety of taking

17 judicial notice and the nature of the fact to be noticed. If the

18 court takes judicial notice before notifying a party, the party,

19 on request, is still entitled to be heard.

20 **(f) Instructing the Jury.** In a civil case, the court

21 must instruct the jury to accept the noticed fact as

1 conclusive. In a criminal case, the court must instruct the
2 jury that it may or may not accept the noticed fact as
3 conclusive.
4

5 Fed. R. Evid. 201.

6 Here, the accuracy and source of the fact requested to be noticed “cannot be
7 reasonably questioned.” The fact that the trunk lock may be released from inside the
8 driver’s door can be readily determined from the 2006 Chevrolet Owner Manual.
9 Therefore, it is requested that the Court take judicial notice of this fact at the
10 appropriate time during trial.
11
12

13 Dated this 9th day of May 2022.

14 Respectfully Submitted,

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Service Certificate

I hereby certify that on May 9, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: AUSA Michael Ellis

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